

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :  
Plaintiffs, : :  
-vs- : Case No. 1:18-cv-950  
COX COMMUNICATIONS, INC., et al.,: :  
Defendants. : :  
-----: :

HEARING ON MOTIONS

September 27, 2019

Before: John F. Anderson, U.S. Mag. Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, and Jeffrey M. Gould,  
Counsel for the Plaintiffs

Thomas M. Buchanan, Michael L. Brody, and  
Jennifer A. Golinveaux, Counsel for the Defendants

1           NOTE: The case is called to be heard at 2:00 p.m. as  
2 follows:

3           THE CLERK: Sony Music Entertainment, et al. versus  
4 Cox Communications, Inc., et al., civil action number  
5 18-cv-950.

6           THE COURT: Well, go ahead and introduce yourselves  
7 so we have it on the recording. Thank you.

8           Mr. Zebrak.

9           MR. ZEBRAK: Good afternoon, Your Honor. Scott  
10 Zebrak with -- for the plaintiffs. With me are my colleagues  
11 Matthew Oppenheim and Jeffrey Gould.

12           And Mr. Oppenheim will argue on our behalf today.

13           THE COURT: Thank you.

14           MR. OPPENHEIM: Good afternoon, Your Honor.

15           THE COURT: Thank you.

16           MR. BUCHANAN: Good afternoon, Your Honor. Thomas  
17 Buchanan, Winston & Strawn, on behalf of the defendant Cox.

18           With me is Michael Brody and Jennifer Golinveaux,  
19 both of Winston & Strawn.

20           THE COURT: Great. And who is going to argue?

21           MR. BUCHANAN: I will, Your Honor.

22           THE COURT: Okay. Thank you.

23           Well, sorry for the delay, but busy day today, but I  
24 did at least keep you from having to wait no longer than one  
25 hour for this.

1           You know, I've reviewed everything. And, you know,  
2 this was a case that I thought was worth having the extended  
3 briefing schedule or the regular briefing schedule, and  
4 everybody got stuff into me on time and things like that. So  
5 I've reviewed it all. I want to hear the argument that counsel  
6 want to make for this.

7           You know, I am viewing this motion -- and, you know,  
8 there is a little bit of discussion back and forth in the  
9 papers that goes beyond this. So, you know, I'm the magistrate  
10 judge. Judge O'Grady is the district judge. My ruling is  
11 going to be on issues having to do with the discovery  
12 sanctions, not necessarily the admissibility as far as, you  
13 know, Federal Rules of Evidences and, you know, did you provide  
14 me with the background information of the spreadsheet and those  
15 kind of things.

16           I mean, I think the issue that has really been  
17 presented to me is to whether, you know, a discovery sanction  
18 for the failure to preserve electronically-stored information,  
19 is appropriate in this case.

20           And there are two, two things that I really would  
21 like to have Mr. Buchanan address directly. One is, you know,  
22 when did the duty to preserve in this case really arise.

23           Obviously, this is information that relates to a  
24 2013/2014 time frame. The case got filed in July of 2018. You  
25 know, under the current version, as of I think 1995 -- current

1 version within the last few years of 37(e), you know, you have  
2 to look to whether the electronically-stored information should  
3 have been preserved in the anticipation or conduct of  
4 litigation.

5 And the second issue is, it has to have been lost  
6 because of a party's action.

7 And my understanding through the contractual  
8 relationship is none of the plaintiffs in this case had a  
9 direct contractual relationship with MarkMonitor, or certainly  
10 not with Audible Magic.

11 So, you know, I just want to make sure I understand  
12 what the theory is as far as agency and some other things. And  
13 I'll just -- on the duty to preserve issue, this is a much  
14 different case than the BMG case. You know, I don't think I'm  
15 saying anything out of school in that case. But there was  
16 communications in that case from the get-go about, you know,  
17 we're going to be filing a lawsuit. We're not in -- you know,  
18 we're going to show them this, we're going to show them that.  
19 You know, a lot of bravado about all of this stuff has to be  
20 done for the purposes of litigation.

21 And so, the issue with Rightscorp, while I think, you  
22 know, we had a fulsome discussion on the law in that case, the  
23 facts in that case, at least having to go to the, you know,  
24 duty to preserve issue, are different than this case.

25 So, with all of that caveat, Mr. Buchanan, let me

1 hear what you have got to say.

2 MR. BUCHANAN: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. BUCHANAN: Well, as the Court is aware, the  
5 standard in terms of retaining the evidence is whether the  
6 party that has the evidence has a reasonable belief that the  
7 evidence in question would be discoverable in a case, whether  
8 it would be admissible, whether it be requested by the other  
9 side, whether it would have some value to the other side.

10 THE COURT: Well, it has to be in anticipation of  
11 litigation. It's not, am I producing something that at some  
12 point in the future may become the subject of a lawsuit.

13 I mean, otherwise it would be, you know, everybody  
14 has to keep everything because you never know when you're going  
15 to get sued.

16 So there has to be something more than -- there has  
17 to be some -- I mean, the rule says: Should have been  
18 preserved in the anticipation or conduct of litigation.

19 MR. BUCHANAN: So we could start with the testimony  
20 of two of the representatives of the plaintiffs who own almost  
21 all of the music in the case. And Alasdair McMullan, he was  
22 asked specifically about anticipation of litigation. The  
23 question was: At the time UMG Recordings authorized the RIAA  
24 to engage MarkMonitor, it understood the evidence that  
25 MarkMonitor would be collecting could be used in a lawsuit,

1 correct? His answer: I think so. I mean, there may have been  
2 some reference to the MarkMonitor retention paperwork, to  
3 potential litigation.

4 That's at 192/193 of his deposition, Exhibit 5 to the  
5 Gould declaration.

6 And then Wade Leak, the vice-president of Legal  
7 Affairs and Compliance at Sony, was asked: Do you know why the  
8 head of litigation of the RIAA would have been involved in this  
9 program, the MarkMonitor program? Answer: Because we were  
10 sending notices out under the Copyright Act and there was,  
11 obviously, a potential for litigation in the process.

12 And then you listen to the -- even the declaration  
13 offered by Mr. Bahun of MarkMonitor, it's paragraph 9, I  
14 believe of that declaration, he says: MarkMonitor takes  
15 preservation obligations very seriously. At all times when  
16 MarkMonitor collects data concerning infringement, it preserves  
17 evidence in a way that allows content owners to protect their  
18 rights and pursue enforcement should they decide to do so.  
19 That is true in all cases, including in connection with  
20 MarkMonitor's work for RIAA at issue in this case.

21 When he was at asked at deposition: So the agreement  
22 between RIAA and MarkMonitor was entered into with the  
23 understanding that the RIAA could use the reports and proposals  
24 generated by MarkMonitor in litigation in the future? Answer:  
25 Yes.

1           And then you go to the Master Agreement. It speaks  
2 of evidence files, it defines them. You know, they have this  
3 role of, you know, collecting evidence and detection and  
4 verification and notification. And they talk about that  
5 process. And it says, they collect the evidence, it becomes  
6 evidence files. Evidence cases to be used in litigation.

7           Evidence cases are defined as: All evidence  
8 collected by MarkMonitor for RIAA in relation to any  
9 peer-to-peer network, Web service, Internet file sharing  
10 platform, or any Internet infringement.

11           Supply of evidence on page 4 of the Master Agreement:  
12 MarkMonitor shall at all times be able to verify and prove the  
13 integrity of any evidence it gathers for RIAA by way of  
14 affidavit or otherwise requested by RIAA. MarkMonitor will  
15 keep backup copies of evidence for as long as reasonably  
16 required for taking and pursuing of legal actions. MarkMonitor  
17 agrees to assist RIAA in litigation cases involving evidence  
18 cases to the furthest extent as requested by RIAA.

19           THE COURT: Well, do you have any evidence that these  
20 documents were destroyed any time near, or not retained, or  
21 whatever the proper term would be, any time in the 2018 time  
22 frame that is six, seven months before the institution of this  
23 action?

24           Do we -- do we know when it was that -- that the  
25 information for up until the time period in February of 2015

1 was no longer retained?

2 MR. BUCHANAN: So we know that throughout from 2008  
3 onward, and as of the time of 2011 that this Master Agreement  
4 was signed, that they were -- agreed to collect this evidence.

5 So you start with when the agreement is signed. And  
6 you look what the agreement says. And you look what the two  
7 representatives from the general counsel's office for the two  
8 largest plaintiffs. And they said, we retained, brought in  
9 RIAA's general counsel, we signed this agreement, we obviously  
10 sent out notices, we anticipated litigation.

11 Mr. Bahun himself says, that's part of the whole  
12 process. So when --

13 THE COURT: Well, there is -- there is the part in  
14 the agreement that says we are going to have a separate  
15 engagement if there is actual litigation, right?

16 MR. BUCHANAN: That's the -- that's the Statement of  
17 Work.

18 THE COURT: Statement of Work.

19 MR. BUCHANAN: And it says -- it says that they will  
20 enter into a separate agreement for university peer-to-peer  
21 programs and corporate peer-to-peer litigation programs.

22 And if you look, this is a commercial, residential  
23 litigation program, is what we are involved here, a commercial  
24 program.

25 So just so you know, universities, obviously, you're



1 not going to terminate -- Cox is not going to terminate a  
2 University or the University of Virginia on three notices when  
3 they have got 30,000 students or 50,000 employees.

4 The same with Amazon if it moved here. It is a  
5 corporate program. Totally different. Those have nothing to  
6 do with the residential notice peer-to-peer program,  
7 infringement program that is involved here.

8 So we know from the testimony and from the agreements  
9 that they were -- they were designed to retain this evidence so  
10 they could give notices and bring litigation. We have that, we  
11 have that testimony.

12 And we know that Audible Magic was producing the  
13 data. Again, the plaintiffs describe Audible Magic and  
14 MarkMonitor as the crème de la crème in the industry, the most  
15 advanced technologically, they are the most reliable, most  
16 credible.

17 So Audible Magic is sending this data, they are  
18 retaining it. It then is apparently retained only to a certain  
19 degree. A number of columns of information or fields of  
20 information are not kept.

21 So we know they're not retaining it. It is being  
22 created every time MarkMonitor queries about a song, say Born  
23 to Run. They get a match, they don't get a match. Once they  
24 get that match, they get a hash, and then they go out, they  
25 find a Cox subscriber's file, computer file, and they see if

1 that song is playing, then they send the notice.

2 THE COURT: And the hash -- I mean, there is one hash  
3 for each work, right? I mean --

4 MR. BUCHANAN: It's a little --

5 THE COURT: -- what Audible Magic does is it verifies  
6 the hash value of a file and how that file relates to a  
7 particular work. The hash value never changes.

8 MR. BUCHANAN: That's correct. The hash value is  
9 contained in the notice. But unlike the BMG case where  
10 Rightscorp, they downloaded the file from the Cox subscriber.

11 THE COURT: Right. But --

12 MR. BUCHANAN: Here they didn't do that.

13 THE COURT: But if you have somebody who verifies  
14 that the hash value is Born to Run -- so, you know, the file  
15 that relates to this hash value is, you know, Bruce  
16 Springsteen's Born to Run, original work --

17 MR. BUCHANAN: Right. So what happens is they  
18 download what they -- so what happens is the RIAA or the  
19 plaintiffs would give titles, artist names, or albums to  
20 MarkMonitor.

21 THE COURT: Right.

22 MR. BUCHANAN: They would then go and then search the  
23 net -- peer-to-peer network to download that. So they would  
24 off that information, author, title, album. They would  
25 download the content from the Torrent file. They would

1 download that. So then they would need to match that with the  
2 Audible Magic database.

3 So they pull out -- they pull out metadata. They  
4 don't download the whole -- the metadata.

5 THE COURT: Right.

6 MR. BUCHANAN: So then according to the Audible Magic  
7 witnesses and the MarkMonitor witnesses, what happens is they  
8 have a duration for the downloaded song. They have a duration  
9 for the referenced or known file. So the Born to Run, that's  
10 on the Audible Magic database. And they run it against there  
11 for whatever, a minute, two minutes, and at least they want at  
12 least 20 seconds of a match.

13 And once they get that, that's when they get this ID,  
14 this driver's license ID information, which is not in the '431  
15 spreadsheet. And that's what, according to Ikezoye, the  
16 witness from Audible Magic, says is -- allows you to drive the  
17 car to get to artist, album, and track.

18 So that's the information that's been sanitized, some  
19 of it, the match duration, the track duration, the match  
20 percentage, and the ID. And they've populated the '431 and the  
21 '236 spreadsheets with a column we know -- it supposedly says:  
22 Real. We have no idea what the Real is based on.

23 THE COURT: Well, the match could have been done in  
24 2005, right? I mean, and maybe I'm misunderstanding, and  
25 that's why I'm trying to ask these sort of basic questions.

1           You have the Born to Run work that you've mentioned.  
2 Audible Magic, through its expertise, then finds that, you  
3 know, this file with this hash value is actually the Born to  
4 Run song.

5           MR. BUCHANAN: Right.

6           THE COURT: So whenever that hash value, a file with  
7 that hash value is recognized, why -- why would they -- if the  
8 hash value never changes, and you verify that that hash value  
9 is what is being distributed, why do you have to go back and  
10 reverify the hash, that actual file?

11          MR. BUCHANAN: So --

12          THE COURT: If the hash value has already been  
13 verified.

14          MR. BUCHANAN: So I think what, actually what happens  
15 is the content is pulled off the downloaded file, it is  
16 digitized, it is then verified by the Audible Magic database.  
17 Then the hash is created, also an Audible Magic ID number.

18           But the point is, we're getting down the road to  
19 matching a hash versus some file in Cox. What we're talking  
20 about is, is the match itself credible.

21           So we have a '431 spreadsheet that has removed  
22 information as to at least 2 percent of the files on that  
23 spreadsheet and sanitized. Okay.

24           So we have a '236 spreadsheet that is created on  
25 December 7, 2018, at the same time the '431 spreadsheet is.

1 Okay. We get the '431 spreadsheet, initially has no metadata,  
2 so we don't know when it was created. It turns out it was  
3 created in 2018 and changed and verified. And then altered or  
4 whatever and then produced.

5 So you have these two spreadsheets. So let's start  
6 off, why does the '236 spreadsheet have on it these files for 2  
7 percent of the -- of the files on there? The columns or the  
8 fields for 2 percent. And so, that -- why was that sanitized  
9 if it's superfluous and means nothing?

10 And then we know we have the Audible Magic, the Rev  
11 344, which, according to our expert, and their expert agrees,  
12 when you look at that and examine that, it only shows a match  
13 for 25 percent of the works in suit.

14 THE COURT: Tell me what you mean by "a match."

15 MR. BUCHANAN: So the match is, the way it works, as  
16 I understand it from reading everything in this case, is once  
17 MarkMonitor downloads, say Born to Run, and they create a file,  
18 and then they run it against, remotely against the Audible  
19 Magic database. They run it for a certain period of time, an  
20 unknown file against a known file.

21 At some point in time there is a match, and that's  
22 the Match Offset column which has been removed from the '431  
23 spreadsheet.

24 The Match Duration is how long the match takes place.  
25 It is supposed to be 20 seconds. So it is like Shazam, I don't

1 know if you have that app. You hold it up to your TV, if there  
2 is a song playing, it matches like in a second.

3 So that's how it works. And so -- and then Track  
4 Duration, which is also a field that has been removed, that's  
5 the length of the known file in the Audible Magic database.  
6 That's been removed.

7 And then the Match Percentage file, interestingly  
8 enough, MarkMonitor added that as a field. And that compares  
9 the known -- the length of the known file with the unknown file  
10 with the length of the match. And they say that's not  
11 relevant.

12 So the point is, once you start running, okay, the  
13 unknown file against the known file inside -- within the  
14 database of Audible Magic, at some point in time you're running  
15 that over 20 seconds to make -- there is a match. And that's  
16 when this ID, this verification number comes out, which they  
17 also say is not relevant.

18 So what we're saying is just step back, you say we go  
19 to trial and we have the '431 spreadsheet. And it says Real as  
20 to everyone. Yet there is a separate spreadsheet that they are  
21 objecting to the admissibility, and which we never would have  
22 obtained had MarkMonitor, okay, one -- when we moved to compel  
23 them, there is a distinct possibility we would have never  
24 gotten that. We would have never known what was on there, and  
25 that had been sanitized.

1           So then you look at that. So we know for a fact that  
2           for 2 percent of those files, that 2 percent, 10 percent do not  
3           have a match. It states right on there, it is 0 or negative 1.  
4           There is no dispute about that. For half of the 2 percent,  
5           it's less than 50 percent.

6           So again, if you're running an unknown song against a  
7           known song, and that might not be the proper technology --  
8           terminology, but you're running them against Born to Run in a  
9           digitized file against the equivalent on the Audible Magic  
10          database, the unknown versus the known, and you run it for  
11          20 seconds.

12          If only half of it matches, you're not sending a  
13          notification. That is not verification.

14          So at a minimum, we have all this data as to 2  
15          percent of the files. And what we're saying, what if we had  
16          the entire 57,000 files, what would it project out? We would  
17          have 10 percent that would show no match. And then we would  
18          have -- we would have 50 have percent, that would be less than  
19          half, or 42 percent that were less than half, 50 percent less  
20          than 90 percent.

21          So before the jury, that would go definitely to the  
22          credibility of that document. We're talking about a  
23          billion-and-a-half in damages. So what's 10 percent? That's  
24          \$150 million. You get up to half, it is 750 million.

25          So what they're saying is, we don't get in the

1 Audible Magic database, that spreadsheet. We don't get in  
2 '236. All that comes in is this sanitized version that  
3 somebody created on behalf of the plaintiffs. Someone removed  
4 that data. We don't who. Why did they move it? Who did it?  
5 Those are questions that maybe the counsel for the plaintiffs  
6 can answer.

7 But why, if it is so superfluous and irrelevant, did  
8 they remove it? And why does it show no match for 10 percent?  
9 That is -- that is really significant.

10 And the case law is clear. I mean, if you show that  
11 you have data that is crucial to -- to the moving party that  
12 could affect the jury, could be instrumental in  
13 cross-examination or challenging the credibility of the  
14 document, or challenging 750 million in damages, that is  
15 something that should not be allowed in in that context unless  
16 they prove -- put up the underlying data. And they haven't.

17 They came up with this post hoc Hail Mary, that's  
18 what -- the only way I can look at it, it is inconsistent with  
19 all the testimony, that somehow --

20 THE COURT: Again, let me just step back and make  
21 sure I'm understanding. You're saying they have information  
22 that they've removed from this spreadsheet that hasn't been  
23 produced to you? Or are you saying that they destroyed  
24 information that isn't currently available?

25 MR. BUCHANAN: I'm saying that -- both.



1 THE COURT: Well, I mean, the '236 spreadsheet you  
2 said had certain information, and then they sanitized certain  
3 information when they presented the '431.

4 MR. BUCHANAN: Right.

5 THE COURT: So, I mean, you have the information that  
6 was in the '236 spreadsheet because you've got it. So there is  
7 no destruction of evidence on that, right?

8 MR. BUCHANAN: Well, if you -- if you juxtapose the  
9 '236 and the '431 -- so we have data for 2 percent of the  
10 files. That brings into question, you know, half of those  
11 files. 10 percent 0 or negative 1. 42 percent less match,  
12 less 50 percent match.

13 THE COURT: Right. And that's --

14 MR. BUCHANAN: And then 50 percent. So that's --

15 THE COURT: And that's -- whether it's 50 percent,  
16 it's really the match or not. I mean --

17 MR. BUCHANAN: So that is the data there, and that's  
18 been taken off the '431.

19 But the key is, is we should have the data on both  
20 the '236 spreadsheet and the '431 for all 57,000 files. That  
21 data should have been maintained according to the Master  
22 Agreement, according to the testimony of the two general  
23 counsels or deputy general counsels of two largest plaintiffs  
24 who are suing us for 1.5 billion.

25 And keep in mind, they are objecting to the

1 admissibility of the '236 and the Audible Magic original, which  
2 is contemporaneously created, which shows only 25. They are  
3 not only objecting to both -- the admissibility of both of  
4 those documents, they're moving to strike our expert because he  
5 relied, he had the gall to rely on the Audible Magic. Again, a  
6 witness that they never identified in their disclosures, which  
7 is apparently key to their case. That's another issue.

8 THE COURT: What actual information did you get from  
9 Audible Magic, the complete download of information that you  
10 got from them?

11 MR. BUCHANAN: So from Audible Magic, we got -- we  
12 got a lot of information. And I think relative for this  
13 purpose is this 344 spreadsheet, which our expert looked, in  
14 which, according to Vance Ikezoye, their 30(b)(6) witness, that  
15 document is, you know -- what that represents is their  
16 transaction logs of the queries by MarkMonitor simultaneously  
17 created.

18 THE COURT: For what time frame?

19 MR. BUCHANAN: For -- I think for the -- for the time  
20 frame -- for the works in suit. So, in other words, any -- any  
21 query that came for a works in suit in this case -- so, right,  
22 they could be downloading in 2008 or 2009. This is supposed to  
23 show, according to Ikezoye -- Ikezoye, that there was a match.

24 And Nick Feamster, our expert, went through that and  
25 said, I only see matches for 25 percent of the work.

1           Their expert, Barbara Frederiksen-Cross, agreed that  
2           that data showed that result, but she claimed, well, according  
3           to the testimony of Ikezoye, there is only substantially --  
4           it's not substantially complete. It doesn't contain  
5           everything.

6           And these are, these transactions were 2012 to 2014.  
7           So they -- we asked them, you know, about these logs and these  
8           queries and the logs resulting from the queries.

9           So that is the pertinent time frame. And that if  
10          that -- so that is the only spreadsheet, the only data that  
11          is -- was contemporaneously created and retained.

12          And the undisputed testimony is that at the same time  
13          that those queries were resulting in that information,  
14          MarkMonitor was getting the same information. So they should  
15          have all those columns.

16          Instead we've gone from like 17 columns in the  
17          Audible Magic database to maybe seven or eight of those  
18          columns, I think there is seven of those columns in the '236,  
19          to three of those columns or fields in the '431 spreadsheet.

20          So -- and there is no dispute what happened. It was,  
21          it was not retained. And I don't think there is any dispute  
22          based on the testimony of their 30(b)(6) witnesses that they  
23          knew when they established this program and hired MarkMonitor  
24          that they were to retain the evidence. And that the  
25          MarkMonitor Statement of Work with the RIAA covers that.

1           And so does the testimony of Mr. Sam Bahun, who put a  
2       declaration and says at all times we kept everything.

3           Now, they do have two witnesses who say, well, we  
4       didn't anticipate litigation. The general counsel of RIAA, Mr.  
5       Bahun, his own testimony that I read under oath contradicts  
6       what he said there. He said, as I read, do you think there was  
7       litigation anticipated here? You know, why did you retain  
8       these documents for litigation, for legal? Yes.

9           So I think it's clear it should have been kept.  
10       There is no question that this is not superfluous information.  
11       If it were superfluous, why then did -- in 2015 did MarkMonitor  
12       start retaining that information, at least as to certain files  
13       and certain protocols? And why was it sanitized from the '431  
14       spreadsheet which was produced by the plaintiffs.

15           Remember, we got the '236 after litigating, you know,  
16       for months from MarkMonitor that objected to giving us  
17       anything.

18           And one other point on that. The MarkMonitor Master  
19       Agreement, Statement of Work, requires MarkMonitor to provide  
20       affidavits, declarations, and evidence and bring witnesses to  
21       the United States. They blocked every single -- every time we  
22       tried to get information from them, they blocked it. They  
23       opposed our entire subpoena, and they fought.

24           We couldn't get to their final witness until the last  
25       day, he's in Lithuania. We had to jump through all these hoops

1 and spend all this money. Yet they could have -- they are  
2 going to bring him to trial. They are going to bring all these  
3 documents -- they had access to all this information. Their  
4 experts had access. Yet they fought us.

5 So, why? Why? Fortunately, we got the '236  
6 spreadsheet. And I think at the end of the day the only -- the  
7 only fair resolution because of the significance of this data,  
8 and the fact that it was destroyed, and the fact that the  
9 witnesses said they were going to keep this for litigation  
10 purposes, is that it be struck.

11 THE COURT: Well, you're saying that back in 2013 and  
12 '14 the plaintiffs said, keep this for litigation purposes that  
13 I'm going to file in 2018?

14 MR. BUCHANAN: That's -- well, they didn't say that,  
15 but that's not the standard. What it is is, it's not like  
16 we're going to sue Cox for these particular claims for this  
17 infringement on this day.

18 What their -- what their witnesses said was that they  
19 anticipated litigation when they hired MarkMonitor through the  
20 RIAA. These were the general counsels of Sony and UMG's  
21 statement.

22 Wade Leak, again, vice-president of Legal Affairs and  
23 Compliance at Sony: Do you know why the head of litigation of  
24 the RIAA would have been involved in the program? We're  
25 talking about the monitor, MarkMonitor, from the inception --

1 THE COURT: Well, and that program involves sending  
2 notices and litigation, right?

3 MR. BUCHANAN: Yes. Because we are sending notices  
4 out under the Copyright Act. And there was, obviously, a  
5 potential for litigation in the process.

6 And the same testimony from the vice-president,  
7 deputy general counsel of UMG. And the agreement itself talks  
8 about evidence files. And what -- an evidence file has nothing  
9 to do with a notice, a notice program. I mean, it could have  
10 you know --

11 THE COURT: Sure it does. I mean, if -- when  
12 you're -- when the customers get the notice, they can say, you  
13 know, I didn't infringe that, show me, show me why you think  
14 I'm infringing. And then they would have to present evidence  
15 to them to show why they think they're infringing.

16 MR. BUCHANAN: So in the same section, the first  
17 sentence that talks about: MarkMonitor should at all times be  
18 able to verify and prove the integrity of any evidence it  
19 gathers.

20 The next sentence is: MarkMonitor will keep backup  
21 copies of the evidence for as long as reasonably required for  
22 taking and pursuing legal actions. MarkMonitor agrees to  
23 assist RIAA in litigation cases involving evidence cases to the  
24 furthest possible extent as required.

25 So one can -- let's assume MarkMonitor destroyed and

1 didn't keep anything. They just, you know, didn't keep  
2 anything. They would -- they would be sued under this  
3 agreement because -- for what? Because they lost the evidence  
4 that allowed them to sue us for \$1.5 billion.

5           There is no question -- I mean, the testimony and the  
6 documentation, that the purpose of them collecting this, yes,  
7 was to send notifications, but that wasn't it. That's what the  
8 documents say.

9           I mean, they point to -- even Mr. Bahun, his  
10 declaration, says: At all times we were retaining this for  
11 purposes of legal action.

12           I mean, so the idea that we have to say that -- we  
13 have to produce a witness that said, yes, on such and such date  
14 I told them to retain that evidence because we were going to  
15 sue Cox for 1.5 billion in a couple years if they didn't shut  
16 down every single person that infringed one time, that's not  
17 the standard.

18           It's did they know or should they have known that the  
19 evidence in question, you know, was somehow related to  
20 litigation, be relevant in litigation. And these are  
21 sophisticated companies. And the fact that they're suing us  
22 for what they are suing us, \$1.5 billion, and the idea that  
23 they can put in the '431 spreadsheet and say, this shows this  
24 Real column -- and by the way, how is that Real column created?  
25 Again, that was created by MarkMonitor.

1           There is no, no witness for Audible Magic that said,  
2           yes, we sent a signal and created a Real column. And it goes  
3           for every single file on those spreadsheets, even where the  
4           file specifically says, there is no match, there is no  
5           percentage match, there is no offset match, 0 or negative 1.

6           I would address the issue of the -- I mean, the '431  
7           is a summary. And, I don't know, the judge had indicated that  
8           maybe you thought that was an evidentiary issue --

9           THE COURT: Yeah. I mean, you know -- and one of the  
10          issues that I -- part of that is, you know, why isn't your  
11          ability to attack the credibility of the document sufficient as  
12          opposed to excluding the document?

13          And anything I say on that, obviously, is going to be  
14          subject to Judge O'Grady's final decision as to admission.

15          But, I mean, you've got all these arguments as to,  
16          you know, how did you come up with this? How did you come up  
17          with that. Doesn't that really just go to the credibility or  
18          the weight that should be given to the document as opposed to  
19          striking the document completely?

20          MR. BUCHANAN: Well, because if we had -- if they had  
21          done what they were supposed to do on the '236 spreadsheet,  
22          every single file would indicate, you know, the ID number, the  
23          so-called driver's license, that key piece of evidence, the  
24          match duration, the track duration, and we could see.

25          And, Judge, obviously, they're going to argue to keep



1 that out and they're going to say, well, that data, you know,  
2 that's just for a small few, 2 percent. Don't worry about  
3 that, you know.

4 You can't -- and then they can't argue, you can't  
5 extrapolate from that. The fact is, if we had -- that's the  
6 question. But the answer is, why -- or the question is, why  
7 didn't they produce the rest of that data? And what impact  
8 would it have on the document and the jury?

9 And you would have to agree that 2 percent versus  
10 100 percent of this data, a full 10 percent with 0 match, and  
11 42 percent with less than a 50 percent match, is devastating, I  
12 think, to that document. Far more --

13 THE COURT: Why do you use the 50 percent number?

14 MR. BUCHANAN: So if you look at the -- if you go to  
15 the '236 spreadsheet, you know, there are, I think -- I don't  
16 know, 57,000 files. 2 percent have the data that we're talking  
17 about, that's four columns.

18 THE COURT: Right.

19 MR. BUCHANAN: And in the 2 percent, if you look at  
20 it, 10 percent of that 2 percent have a 0 or negative 1.  
21 50 percent -- 42 percent of the 2 percent have a match of less  
22 than 50 percent.

23 So my argument --

24 THE COURT: When you say "a match of less than  
25 50 percent," what are you saying?

1 MR. BUCHANAN: When you show -- look at the match  
2 duration and match percentage, that's what it shows. It's less  
3 -- and we have those exhibits there.

4 THE COURT: Yeah.

5 MR. BUCHANAN: And so, I mean, if you're running,  
6 okay, an unknown file music against a known music file,  
7 digitized or whatever, and you run it and they're both five  
8 minutes long, and you run them for 30 seconds or 40 seconds or  
9 a minute, and if they match 100 percent, you know, then that's  
10 a match.

11 But to give you an example, what very well could be  
12 happening here is someone downloads -- MarkMonitor downloads  
13 Bruce Springsteen's Born to Run from his Greatest Hits. It  
14 turns out I've made a video of my son Jimmy in a track meet,  
15 I've called it Born to Run, and that picks it up. They  
16 download that content and it doesn't match, zero match, because  
17 it's a video, or maybe it's a song I created. Or maybe it's a  
18 high school band. Or maybe it's an orchestra's version of it.  
19 It's not a match. It doesn't match a work in suit.

20 And remember that they are using this evidence to  
21 link, you know, the notifications to the detections,  
22 downloading, to the verification. This is the bridge from the  
23 liability, to prove liability to get to their 1.5 billion in  
24 damages.

25 And we should have the right to have all the

1 underlying data that brings into question the integrity and  
2 credibility of that proposition based on that exhibit.

3 THE COURT: All right. Anything else?

4 MR. BUCHANAN: Only if you wanted to hear on the 1006  
5 -- I mean, this is a summary --

6 THE COURT: Yeah. I mean, as much as I'd love to  
7 hear additional argument, I think that's an issue that is more  
8 properly addressed to Judge O'Grady, if I don't strike it.

9 Okay.

10 MR. OPPENHEIM: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. OPPENHEIM: There is virtually nothing Mr.  
13 Buchanan just said factually or legally that's right. And I  
14 hate to start that way --

15 THE COURT: Well, no, I think that's unfair. I think  
16 he has expressed what the law is on sanctions and the duty to  
17 preserve, it does arise at a time in which you anticipate the  
18 conduct of litigation. Some of that -- but the question is  
19 whether this is -- in fact meets that standard.

20 And the -- the other thing I'm -- you need to explain  
21 to me what it is that Audible Magic produced, what it means,  
22 and how it relates to the spreadsheets.

23 MR. OPPENHEIM: Absolutely, Your Honor. But if I can  
24 step back, please.

25 THE COURT: Okay.

1 MR. OPPENHEIM: Cox can't succeed on any of the  
2 individual elements here, and I'm going to go through each of  
3 them, yet alone all of them, by clear and convincing evidence,  
4 which is the burden they need to show.

5 What controls here is Rule 37(e). And under Rule  
6 37(e), what the defendants -- excuse me, what Cox is seeking to  
7 do is explicitly prohibited. It's not permitted.

8 In order for them to get the type of sanction that  
9 they're seeking, they would have to show a -- they would have  
10 to have a finding that the plaintiffs acted with the intent to  
11 deprive Cox of the information's use in the litigation.

12 THE COURT: No, no.

13 MR. OPPENHEIM: That's what --

14 THE COURT: I can, under (e)(1), enter a sanction no  
15 greater than I think is necessary to cure the prejudice.

16 MR. OPPENHEIM: You are --

17 THE COURT: So if I -- if I think the prejudice has  
18 been serious enough that that exhibit should be excluded, I can  
19 exclude that exhibit --

20 MR. OPPENHEIM: Your Honor has broad --

21 THE COURT: -- under (e)(1).

22 MR. OPPENHEIM: I'm sorry, Your Honor, I didn't mean  
23 to interrupt.

24 THE COURT: (e)(2) is where you get into, you know,  
25 presumption that the lost information was unfavorable,

1 instructions to the jury, or dismissing an action.

2 So there is, you know -- the first step doesn't have  
3 to show that they acted with the intent to deprive another  
4 party of the use in the litigation.

5 MR. OPPENHEIM: So, Your Honor, again, I apologize  
6 for interrupting, it wasn't my intent.

7 If I could hand up to you, just because of ease of  
8 reference, the Comments to Rule 37. And for the clerk as well.  
9 I am sorry.

10 There is a lot in these Comments very useful, Your  
11 Honor.

12 THE COURT: No, I know.

13 MR. OPPENHEIM: And in particular, if I can draw your  
14 attention to the Comment that starts at the bottom of page 16.  
15 And this is the Comments to subdivision (e)(1). It says: In  
16 an appropriate case, it may be that serious measures are  
17 necessary to cure prejudice found by the Court, such as  
18 forbidding the party that failed to preserve information from  
19 putting on certain evidence, permitting the parties to present  
20 evidence, and argument to the jury regarding the loss of  
21 information, or giving the jury instructions to assist in its  
22 evaluation of such evidence or argument other than instructions  
23 to which subdivision (e)(2) apply.

24 And then here is the operative and critical language:  
25 Care must be taken, however, to ensure that curative measures

1 under subdivision (e)(1) do not have the effect of measures  
2 that are permitted under subdivision (e)(2) only on a finding  
3 of intent to deprive another party of the lost information's  
4 use in the litigation. An example of an inappropriate (e)(1)  
5 measure might be an order striking pleadings related to or  
6 precluding a party from offering any evidence in support of the  
7 central or only claim or defense in the case.

8 And that is precisely what they're seeking to do.  
9 Now, I don't think we have to get there, Your Honor, because I  
10 don't think they're going to meet the duty piece. And when I  
11 walk through what the evidence is, I think -- I think you're  
12 going to agree that it's not material and nothing was  
13 destroyed. Nothing was -- what was the word that I kept  
14 hearing, which I found -- "sanitized."

15 And I'm going to walk through the facts here, Your  
16 Honor. It's just not accurate.

17 Before I do, one of the things Mr. Buchanan said, and  
18 I want this to be unambiguously clear, there is not a single  
19 work in this case where there was a failed match. Every single  
20 work that is being sued on, there was a match. And that match  
21 was done based on Audible Magic's technology, and they have  
22 said with a zero error rate.

23 THE COURT: All right, but --

24 MR. OPPENHEIM: But I will back up.

25 THE COURT: So that's 50-some thousand works that you

1 say there was a match. This case involves notices being sent  
2 out many, many times other than those 50,000 works.

3 So there could be a notice that was sent out based  
4 upon a non-match, I guess, is what the defendant is arguing  
5 here.

6 MR. OPPENHEIM: No. So -- so let me walk through, if  
7 I may, the history here.

8 So, first, the program began with the initial  
9 contract in 2008 and then was subsequently amended. And Mr.  
10 Buchanan referred repeatedly to the preservation discussion in  
11 those -- in the MSA and SOW. But what he didn't describe is  
12 that that document itself lays out in great detail, point by  
13 point, exactly what will be preserved.

14 On pages --

15 THE COURT: Which exhibit is this? This is M --

16 MR. OPPENHEIM: I'm sorry, it is Exhibit T to the  
17 Leiden declaration, I believe. I'm sorry.

18 THE COURT: No, that's the statement -- T is the  
19 Statement of Work. Let's see, M is the --

20 MR. OPPENHEIM: Yes, it's the Statement of Work --

21 THE COURT: 2012 --

22 MR. OPPENHEIM: In the Statement of Work, Your Honor,  
23 on --

24 THE COURT: Okay.

25 MR. OPPENHEIM: -- page 27, it's a little cut off

1 maybe on the bottom of the page, but -- there is a -- I'll wait  
2 for --

3 THE COURT: So this is the 2012 Statement of Work?

4 MR. OPPENHEIM: This is the 2012 Statement of Work.

5 THE COURT: I thought you said this started in 2018?

6 MR. OPPENHEIM: Well, the first, the program did  
7 first begin in 2008. Put this SOW lays out in detail what was  
8 being preserved. And what it says here on this page under the  
9 section Data Capture and Storage, there is a long list of  
10 bullet points of what would be retained and preserved, what was  
11 in each evidence package.

12 And you will see on the second page there, RIAA 28,  
13 that it describes -- I'm sorry, did I get the page wrong?  
14 Sorry, it starts on 27. It does say: Name of the infringing  
15 file. And then the date of the infringement. Lists all these  
16 things.

17 And then it says: Details of the shared file list of  
18 the user, peer or client for RIAA evidence only, full  
19 repertoire details, including artist name and track name.

20 So they went to great length to describe in this  
21 document what would be retained. Now --

22 THE COURT: Is all that information retained and  
23 produced for the time period from February 2013 to  
24 November 2014?

25 MR. OPPENHEIM: Everything that MarkMonitor retained



1 according to this agreement was produced.

2 THE COURT: So you're saying that MarkMonitor was  
3 required to keep each of these bullet points that is listed on  
4 pages 27 and 28?

5 MR. OPPENHEIM: Yes.

6 THE COURT: That they did maintain that information.  
7 And that that information has been produced to the defendants  
8 for the time period February 2013 through November 2014?

9 MR. OPPENHEIM: It actually may be even on a slightly  
10 broader time period, Your Honor, but at a minimum it's that  
11 time period.

12 I will say, I believe there it was some tiny number  
13 of files that weren't located, in the couple hundred I think,  
14 out of hundreds of thousands.

15 But everything that MarkMonitor had which was  
16 retained here, which is every one of these elements, was  
17 preserved and produced.

18 And -- but I want to back up and I want to go through  
19 what the different spreadsheets are. And I want to -- and I  
20 want to talk about it. Because what was first produced to the  
21 defendants -- so there are four spreadsheets at issue before  
22 Your Honor. There is the '281 spreadsheet and the '431  
23 spreadsheets. They were produced by the plaintiffs. They are  
24 exactly the same.

25 The only distinction is that after we produced the

1 '281, Cox asked the plaintiffs to produce it with the metadata  
2 surrounding the spreadsheet. So we did it. We produced the  
3 exact same spreadsheet again with the metadata. And that's  
4 what the '431 is. Those were produced by the plaintiffs.

5 The '236 spreadsheet was a spreadsheet that the  
6 defendants requested in a subpoena from MarkMonitor. Now, this  
7 is where they have asked for -- they asked MarkMonitor for a  
8 much broader set of information that the plaintiffs agreed to  
9 produce.

10 And by the way, they never came back -- when the  
11 plaintiffs produced their spreadsheets, they never -- they  
12 never asked for more. They never moved the Court for more.  
13 They took the '281 and '431, and that's what they relied on.  
14 And they got those reasonably early in discovery.

15 The '236 spreadsheet that they got from MarkMonitor  
16 had four tabs to it, Your Honor. And those four tabs related  
17 to each of the four different file sharing networks that are at  
18 issue in the case.

19 In several of those tabs they -- MarkMonitor included  
20 information that was gathered in 2015 and later. And that's  
21 what Mr. Buchanan keeps referring to. Not what MarkMonitor  
22 retained early on.

23 What the declaration of Sam Bahun sets forth is that  
24 MarkMonitor, when they started this program, when they -- and I  
25 should back up because Mr. Buchanan technologically said a few

1 things that weren't quite right.

2 MarkMonitor does a download of a file on a network.  
3 That file already has a hash in it. MarkMonitor doesn't create  
4 the hash. MarkMonitor doesn't create the file. That has a  
5 hash. That file is unique to the hash, the experts agree on  
6 that. The hash is unique to the file. That file may contain  
7 one or many different recordings.

8 Once it's downloaded, they query Audible Magic to  
9 understand what's it -- what are the recordings that are in  
10 this file. They get back an answer. It's a yes or no  
11 proposition. And they get a bunch of data.

12 Up until 2015 MarkMonitor--

13 THE COURT: Well, the bunch of data supports whether  
14 it was a match or wasn't a match, right?

15 MR. OPPENHEIM: If there was no match, they would --  
16 if there was no match, they would never get an artist name,  
17 track name, or album name.

18 THE COURT: But if they get a match, Audible Magic  
19 provides them with what data other than it's a match?

20 MR. OPPENHEIM: They provide, I assume, the 17 fields  
21 of data.

22 THE COURT: That proves that it actually was a match,  
23 or establishes the basis for their analysis that it was an  
24 actual match?

25 MR. OPPENHEIM: But -- but as soon as they return an

1 artist name, an album name, and a track name, that -- that  
2 identifies that there was a match to those.

3 The only way Audible Magic can find that information  
4 is if they use their proprietary number, which is the Audible  
5 Magic ID. That number is useless to anybody other than Audible  
6 Magic. It's just how they relate things within Audible Magic's  
7 database.

8 So the notion that this is some secret, important  
9 number, is absurd. You could show it to a judge or a jury all  
10 day long, they would have no idea. They would go, okay, it's a  
11 number. And not even -- it's alphanumeric.

12 So -- so that is useless. That piece of information  
13 unlocks, right, it's the key to unlock the artist name, track  
14 name and album name. Which, once that's populated in a  
15 spreadsheet, we know there's a match.

16 Now, that match could have been based on anywhere  
17 from 20 seconds to the full length of a song. And from --  
18 sometimes they did 20 seconds, sometimes they did the full  
19 length.

20 And if you look in the MarkMonitor spreadsheet -- and  
21 if I may, can we hand up just a larger piece here -- not that.  
22 This one, start with that one. Let's start with that.

23 It may help Your Honor to just see what song it looks  
24 like --

25 THE COURT: Give it to Mr. Buchanan and his

1 colleagues.

2 MR. OPPENHEIM: Thank you. So this is the  
3 MarkMonitor spreadsheet. And it's filtered to exclude the 0s  
4 and 1s for a moment. Just so you can see it without the 0s and  
5 1s. And I'll go to the 0s and 1s in a minute, Your Honor, I am  
6 happy to.

7 So this is the entirety of the spreadsheet. Sorry.  
8 I stand corrected. It's only the Ares tab. The entirety of  
9 it, including the BitTorrent one, would be too many trees to  
10 kill.

11 So -- so prior to 2015 MarkMonitor never kept the  
12 highlighted columns. And as the Sam Bahun declaration  
13 explains, they didn't need to. They didn't feel like they  
14 needed to, they didn't use it.

15 And after 2015 they started to include it. But --

16 THE COURT: Why? What changed in 2015?

17 MR. OPPENHEIM: So he says in his declaration, Your  
18 Honor, which in the end of his declaration describes that other  
19 clients with other uses -- sorry.

20 So he says in paragraph 28 of his declaration, Your  
21 Honor: The core of MarkMonitor's business model, including as  
22 it relates to this case, requires it to gather valid evidence  
23 sufficient to protect our clients' copyrighted content. As  
24 stated herein, the superfluous data that Cox contends was  
25 spoliated was something we were not required to gather, nor was

1 it relevant to our Statement of Work at the time, which was not  
2 performed for active litigation or in anticipation of  
3 litigation.

4 He goes on to say: Moreover, the Audible Magic data  
5 simply corroborates the file, the full audio files that  
6 MarkMonitor secured as part of its detection of copyright  
7 infringement -- Cox subscribers. The absence of such data in  
8 the spreadsheet at issue is immaterial to our ability to  
9 establish that there was infringement.

10 He also, if you look at the Vance -- sorry. Where is  
11 the -- okay. Sorry, I read the wrong paragraph to Your Honor.  
12 Apologies.

13 Paragraph 25: Nevertheless, given the increasing  
14 power of data analytics and the prospect that such information  
15 could potentially be useful for some unknown purpose in the  
16 future, MarkMonitor began recording this additional information  
17 sometime in 2015.

18 So that's what he says on that issue.

19 They, by the way, they took Mr. Bahun's deposition.  
20 They took two depositions of the MarkMonitor witnesses. Mr.  
21 Bahun's deposition they took quite early. They deposed him in  
22 June. Oh, okay, in June. They deposed him for an entire day,  
23 never once asked him about any of these columns, never once.

24 THE COURT: They didn't have the document then, did  
25 they?

1 MR. OPPENHEIM: They did. They absolutely did.

2 And so, if you look at this document, Your Honor, you  
3 see the M Item ID, which is the first highlighted column. It's  
4 just an alphanumeric string. It's not useful in any possible  
5 way for anybody.

6 Match Offset just simply says where they would begin  
7 to look at the match. Because sometimes you would start -- a  
8 file may have dead space at the beginning of it. And so, you  
9 might not begin your match until somewhat in.

10 So you see on the first one, it started right away.  
11 The third one it started a second in. The fourth one,  
12 28 seconds in.

13 The match duration on the first one shows it was a  
14 534 second match duration on a 530 second -- 36 second file.  
15 Right.

16 And if you go through this, and we organized this in  
17 declining descending order, you will see that the very lowest  
18 match is 20 seconds. Which is the -- Vance Ikezoye, the  
19 Audible Magic CEO, in his deposition, and I believe, but  
20 certainly in his declaration, said 20 seconds is the minimum  
21 they do. And they know if that they get a 20-second match,  
22 they have a zero error rate.

23 There is not a single piece of evidence that Cox can  
24 point to say that a single work in suit did not match.

25 So what they're saying is, data that was collected in

1 2015 may impact information as to claims in 2013 and 2014. It  
2 doesn't make any sense. But I also, I don't want to let --

3 THE COURT: All right, let me just make sure I  
4 understand your argument as it compares to what Mr. Buchanan  
5 said.

6 He said, when you look at this information, there are  
7 two components. This is only 2 percent of the works; is that  
8 right?

9 So that of the 56-some thousand works at issue, this  
10 30-page spreadsheet only involves a certain percentage of those  
11 works?

12 MR. OPPENHEIM: These percentages, they are  
13 staggeringly crazy and wrong. And here is why. They are doing  
14 percentages also off of the Audible Magic spreadsheet, which we  
15 haven't discussed yet.

16 So this is the MarkMonitor spreadsheet.

17 THE COURT: Okay.

18 MR. OPPENHEIM: Okay. And I do want to address one  
19 other thing in this MarkMonitor spreadsheet before we leave it  
20 because it's a question that you asked earlier and something  
21 Mr. Buchanan raised.

22 There are fields in the MarkMonitor spreadsheet that  
23 say Null for those same columns, the highlighted columns. You  
24 don't see it there. I can hand it up if you would like, Your  
25 Honor.



1 THE COURT: I don't need to. You can just tell me.

2 MR. OPPENHEIM: And when Mr. Bahun was asked why, he  
3 said, well, we had no data for them. There are fields that say  
4 0 or negative 1, including, and Mr. Buchanan made reference to  
5 this, that the Match Duration says 0 or negative 1.

6 And from that, Mr. Buchanan says because -- and this  
7 is critical point. Cox is saying because the field says 0 or  
8 negative 1, there was no match.

9 They never asked MarkMonitor or Audible Magic in a  
10 deposition what 0 or negative 1 in the column meant. So that  
11 assumption is entirely of the lawyer's fabrication.

12 Now, if they had asked, what they would have learned  
13 is that in 2015 when they started to try to populate these  
14 fields, they were trying different ways to populate them. And  
15 sometimes the data returned a Null, and some -- and sometimes  
16 the data returned a negative 1.

17 Obviously, you can't have a match duration of  
18 negative 1, it wouldn't mean -- what would that mean? But they  
19 never asked a witness.

20 So they're asking you to go along on this journey  
21 that there is some known matches based on the presence of data  
22 that they never asked the witness about, they're making  
23 assumptions about, and they're wrong on it.

24 The Audible Magic spreadsheet is even more  
25 infuriating because they subpoenaed Audible Magic. And they

1 had apparently some dispute back and forth on the scope of what  
2 they were going to get from Audible Magic.

3 Audible Magic provided files for 2012 to 2014, as I  
4 understand it. Right? No, Audible Magic.

5 As Your Honor observed, they started doing matches in  
6 2008. So if matches were done from 2008 through 2011, it  
7 wouldn't appear in the results that Audible Magic gave them.

8 So they say, oh, well, we don't have these results,  
9 so 75 percent of the files were never even checked. But it  
10 goes further than that. Not only do they have a restricted  
11 time period, the witness also testified --

12 THE COURT: Well, the time period that Audible Magic  
13 produced documents is -- is larger than the time period in  
14 which you are claiming the notices in this case.

15 So why -- why wouldn't the Audible Magic  
16 spreadsheets, if these are transaction reports of every time  
17 that I had some contact with MarkMonitor and prompted them to  
18 then send a notice to Cox, why doesn't that show up in the  
19 Audible Magic transaction log?

20 MR. OPPENHEIM: So Audible Magic, if it does a  
21 look-up on a hash in 2008, it does the match there. And so,  
22 the log will show a 2008 match.

23 THE COURT: But you don't send a notice out in 2014  
24 for a 2008 match.

25 MR. OPPENHEIM: No, no, no. But once -- so Audible

1 Magic is the fingerprint company.

2 THE COURT: Right.

3 MR. OPPENHEIM: When MarkMonitor down -- so let's say  
4 in 2008 MarkMonitor downloads a file from Mr. Buchanan's  
5 computer and there is a hash associated with it. They send it  
6 to Audible Magic, and it returns -- what were we talking --  
7 Bruce Springsteen's Born to Run, great Sony track. That -- so  
8 Audible Magic returns a result in 2008.

9 MarkMonitor now knows that any file with this hash  
10 has Bruce Springsteen's Born to Run. They don't have to check  
11 it again ever because, as all the experts agree, the hash is  
12 unique. Any time you find that hash, it's going to be the same  
13 thing.

14 THE COURT: So they don't have Audible Magic confirm  
15 anything once they get a report from Audible Magic as to a  
16 particular hash value?

17 MR. OPPENHEIM: They don't need to. There are from  
18 time to time, as it turns out, they did run some things. So  
19 there were some later identifications of files that had been  
20 downloaded earlier. Why they did that, I don't know. But they  
21 didn't need to. And for many they didn't.

22 So the Audible Magic transaction logs, if they're  
23 from 2012 to 2014, wouldn't cover the first -- what is that?

24 THE COURT: Four years.

25 MR. OPPENHEIM: Five years, four or five years --

1 THE COURT: Right.

2 MR. OPPENHEIM: -- of identification. But -- but Mr.  
3 Ikezoye also said that when they were producing the documents,  
4 they had to pull the transaction logs off backup tapes and they  
5 couldn't find everything. And that's in his deposition  
6 testimony.

7 Now, they never -- Cox never put that spreadsheet,  
8 the Audible Magic spreadsheet, in front of Mr. Ikezoye to ask  
9 him about it. So they asked questions about transaction logs.  
10 They never asked him about specific columns. They never asked  
11 him about that particular document.

12 They -- Audible Magic produced, I believe it's  
13 something in the range of 15,000 documents. So they ask him  
14 generically about transaction logs. And then they say, well,  
15 we got almost everything, and so, now based on that comparison  
16 of the Audible Magic spreadsheet to the MarkMonitor  
17 spreadsheet, 75 percent of the works didn't match.

18 It just -- it doesn't, it doesn't hold water, Your  
19 Honor. Doesn't hold water.

20 So that's -- that's the background. You started by  
21 asking about duty, so maybe I should turn to that, Your Honor.

22 THE COURT: Okay.

23 MR. OPPENHEIM: So the legal standard here is -- is  
24 not that there is some theoretical possibility of litigation.  
25 They need to show that litigation was reasonably foreseeable.

1           And the mere existence of a dispute does not  
2 necessarily mean that the parties should reasonably anticipate  
3 litigation. And here, when Mr. Buchanan is citing to all of  
4 this testimony, it's all about a theoretical possibility of  
5 litigation.

6           The first time a demand letter went out from the  
7 plaintiffs to Cox was I believe in 2016, Your Honor. It was  
8 after the BMG verdict. That's the first time there was a  
9 demand letter.

10           So they're complaining about data that they think  
11 wasn't collected and preserved in 2008 to 2014. The demand  
12 letter didn't even go until 2016.

13           THE COURT: Well, that doesn't -- there is the time  
14 period before you're anticipating, before you actually send a  
15 demand letter as well. So, I mean --

16           MR. OPPENHEIM: That's absolutely right, Your Honor.  
17 And in this respect, I think that what Mr. Marks, the general  
18 counsel of the RIAA, said in his declaration is -- really hits  
19 the nail on the head.

20           The recording industry instituted this program of  
21 sending notices because they wanted to avoid litigation. As  
22 you may well know, Your Honor, the recording industry had sued  
23 peer-to-peer infringers individually for many years. It was a  
24 somewhat controversial program.

25           The RAI -- the recording industry stopped doing that

1 and they instituted this program. And the whole point of this  
2 program, of giving notice, was to send notices to ISPs in the  
3 anticipation that they would take care of the infringement on  
4 their networks. It was to avoid litigation. Had Cox actually  
5 done what they were supposed to do, there would never have been  
6 a litigation.

7 The testimony of Mr. McMullan and Mr. Leak, they  
8 never asked them: When did you contemplate bringing a case  
9 against Cox? When did you contemplate bringing a case against  
10 an ISP? That's not the kind of testimony that they asked for  
11 because they didn't want those answers.

12 The -- so the notices were take-downs. And unlike  
13 the BMG case where there were explicit threats to sue, these  
14 were simple take-down notices. They were notices of  
15 infringement to an ISP. They never threatened litigation in  
16 those notices.

17 And the Comments to Rule 37 actually speak to the  
18 idea that there -- that you have to be careful when looking to  
19 outside sources to create a duty.

20 So, you were -- Mr. Buchanan -- the only evidence, by  
21 the way, that they have that there was a duty is they look at  
22 the MarkMonitor agreements.

23 But if you read the Comments, excuse me, to Rule 37,  
24 while a party may have -- this is paragraph 7 of the Comments,  
25 Your Honor: While a party may have an independent obligation

1 to preserve evidence, such a document retention policy, it does  
2 necessarily mean that the party had a duty with respect to a  
3 litigation.

4 And the fact that a party failed to observe some  
5 other preservation obligation does not itself prove that its  
6 efforts to preserve were not reasonable with respect to a  
7 particular case. So that's paragraph 7 of the 2015 Comments.

8 And so, that's exactly what the MarkMonitor agreement  
9 is. Even if you assume that the MarkMonitor agreement raised  
10 some prospect that they had some -- that MarkMonitor had some  
11 obligation to preserve this, which we disagree with because --

12 THE COURT: Well, let's go back to that. Because you  
13 say, the agreement specifies what they need to keep. And  
14 again, I want to make sure I didn't misunderstand this because  
15 I need to hear from Mr. Buchanan if this isn't -- the  
16 information that this agreement that says, this is what you  
17 need to keep, MarkMonitor did keep and has been produced to the  
18 defendant for the time period 2013 and 2014?

19 MR. OPPENHEIM: Yes, Your Honor.

20 THE COURT: Is that right?

21 MR. OPPENHEIM: Yes, Your Honor.

22 THE COURT: Well, I want -- this has some --

23 MR. OPPENHEIM: I want to make sure I get this right.

24 THE COURT: -- real significance to it, so I don't  
25 want to --

1 MR. OPPENHEIM: Okay. I'm told that there -- one of  
2 the categories, town, county, and country of the ISP address,  
3 may not have been produced. It's obviously not relevant to  
4 this dispute.

5 And -- well, the asset rights holder was produced  
6 because it says who owned it. All the relevant fields were  
7 produced, Your Honor.

8 What -- what Cox wants to do is take generic language  
9 in a private agreement and say, because of that generic  
10 language it created an obligation to retain the specific  
11 information. And because of that, there is, therefore, a legal  
12 duty in this case that was breached.

13 So there are two jumps that they have to make to get  
14 there. One is that this agreement required the preservation of  
15 the three columns they're complaining about. Nothing in the  
16 agreement could suggest that.

17 And if you look at what the agreement is about, what  
18 those columns are about, there is no reason to preserve them.  
19 That's number one.

20 Two. Even if you assume that that's right, just  
21 because there's an independent obligation, as the Comments to  
22 the rules say, doesn't mean there was a duty here. And that's  
23 a duty on MarkMonitor --

24 THE COURT: Well, I mean, I think a reasonable  
25 interpretation of the Comments are, if you have to keep your



1 tax returns for five years and, you know, you don't keep your  
2 tax returns for five years, that's an independent obligation.

3 If there is an obligation that you've entered into a  
4 contract to do something for litigation purposes, that's a  
5 little bit different. I mean, that's dancing around the edges  
6 with that.

7 But, I mean, I think I understand your position on  
8 this. Is that there was -- even reading the Master Agreement,  
9 taking into consideration what is said in the Statement of  
10 Work, MarkMonitor had a duty to preserve specific information  
11 that was actually preserved and has been produced.

12 MR. OPPENHEIM: Yes, Your Honor. Yes, Your Honor. I  
13 think that the Comments go further than what you just  
14 described, but we need not debate that.

15 So there is another Comment that I think is useful.  
16 I've spent a lot of time on the Comments. I really like this  
17 2015 amendment.

18 THE COURT: They are helpful.

19 MR. OPPENHEIM: And that's paragraph 9, Your Honor.  
20 And it says that the Rule 37(e): Applies only if the  
21 information was lost because the party failed to take  
22 reasonable steps to preserve the information. Due to the  
23 ever-increasing of electronically-stored information and the  
24 multitude of devices that generate such information, the  
25 perfection in preserving all relevant electronically-stored

1 information is often impossible.

2 And then it says: The routine good faith operation  
3 of an electronic information system would be a relevant factor  
4 for the Court to consider in evaluating whether a party failed  
5 to take reasonable steps to preserve lost information.

6 Here, Mr. Bahun on behalf of MarkMonitor made very  
7 clear, they didn't preserve this information up to 2015 because  
8 they didn't feel like they needed it. Starting in 2015, they  
9 began to preserve it for entirely different reasons.

10 And Mr. Ikezoye, to respond to your earlier question,  
11 gave some sense of why those other columns -- Mr. Ikezoye, I  
12 apologize, is the CEO of Audible Magic -- explained why those  
13 other columns are useful for other purposes. And he does that  
14 in paragraph 18 of his declaration, which is -- I don't have  
15 the -- oh, it's Document 352-2.

16 And what Mr. Ikezoye says is: The additional  
17 information, those three columns, may be useful for certain  
18 customers for other reasons. For example, it can assist Web  
19 sites or companies hosting content, i.e. a video game streaming  
20 company, to readily identify the location, scope, and duration  
21 of infringing content on its platform for removal or muting of  
22 the audio. In particular, the combination of the match offset,  
23 match duration, and track duration enables the customer to skip  
24 ahead to examine different parts of the file or skip to the end  
25 of the file.

1           He's explaining -- Mr. Ikezoye is explaining why  
2 Audible Magic uses that -- has that data for other purposes.

3           In this case, again, Your Honor, there is no  
4 question, there was a match of every one of the works in suit.  
5 There was a match of every one of the works in suit.

6           So let me turn, Your Honor, to whether or not this  
7 information was material. And here, I've already gone through  
8 the -- what the three different columns are. So let me just --  
9 let me go through each of MarkMonitor's -- excuse me, Cox's  
10 arguments here.

11           First off, Cox claims that the MarkMonitor designee  
12 testified, this is at page 10 of their brief, that MarkMonitor  
13 routinely destroyed data that was provided by Audible Magic  
14 prior to 2015. That kind of language from a lawyer is  
15 inappropriate. Because if you look at the testimony of the  
16 MarkMonitor witnesses, it doesn't support that point at all.  
17 Nothing in what the witness said could be used to support that.

18           The MarkMonitor witnesses said: From our  
19 perspective, we didn't have a need for that data, so we didn't  
20 capture it.

21           There was no destruction, Your Honor, a word that  
22 permeates their briefing. A failure to retain data that was  
23 returned as a result of a look-up is not a destruction of  
24 evidence.

25           It's akin, Your Honor, if you ask a clerk to do a

1 Westlaw search for a set of cases, they get a bunch of cases,  
2 and each of those cases has a cover sheet. They may have saved  
3 the cases, but they didn't save the cover sheet. They didn't  
4 need to because they have the cases.

5 Here, Cox has all of the data that was retained and  
6 all the underlying files.

7 Cox argues that -- that the spreadsheets  
8 demonstrate -- the Audible Magic spreadsheets demonstrate that  
9 the MarkMonitor spreadsheets are inaccurate and incomplete.  
10 I've gone through this. The 75 percent number, Your Honor,  
11 it's hogwash. They never asked the Audible Magic witness about  
12 the spreadsheet. They have no foundation to put it forward,  
13 Your Honor.

14 And I'm not talking about whether they put it forward  
15 in trial. To put it forward to Your Honor. If they're going  
16 to base a spoliation motion on the Audible Magic spreadsheet,  
17 they should have at least asked the witness about it so that  
18 they would have some credible basis to tell Your Honor what the  
19 spreadsheet means. But they don't.

20 Cox argues that the MarkMonitor spreadsheets are  
21 summaries. I get it. I agree with you, Your Honor, that's a  
22 1006 issue for Judge O'Grady.

23 Having said that, a download of data from a server is  
24 not a summary. It's a download of data from a server. If  
25 there were a summary, it would be way shorter, Your Honor. I

1 have given you a tiny little excerpt. Nobody would call that a  
2 summary.

3 Cox argues that because MarkMonitor subsequently  
4 retained Audible Magic data fields, it shows that those data  
5 fields are material.

6 THE COURT: You've addressed that.

7 MR. OPPENHEIM: I've addressed that, Your Honor.

8 Cox argues that the discarded data and the retained  
9 data are inconsistent. This is this point, Your Honor, that  
10 some of the columns say Null, 0, or negative 1. I've addressed  
11 this, Your Honor. Those columns, that's 2015 data that  
12 MarkMonitor was trying to import. They never asked a question.

13 Again, they should not be permitted to come forward  
14 and seek a sanction based on a spreadsheet, the data in a  
15 spreadsheet they never asked a witness about.

16 On the issue of culpability, Your Honor. Under  
17 (e) (2), they have to show that there was something more, that  
18 there was a bad faith intent.

19 I think Your Honor has, prior to the Rule 37(e)  
20 amendment, Your Honor wrote some very interesting opinions  
21 trying to understand in a spoliation motion whether negligence  
22 was enough.

23 THE COURT: Under Fourth Circuit law.

24 MR. OPPENHEIM: Under Fourth Circuit law.

25 Unfortunately, all of that great legal analysis doesn't apply

1 to the new paradigm. Because the new paradigm really -- what  
2 the Federal Rules Committee was trying to do was say, there  
3 should be consistency across the courts. And they said, Rule  
4 37 takes the place of the Court's inherent authority on issues  
5 of ESI. So Rule 37(e) controls on this. And that's -- that's  
6 from the Committee notes.

7 And under 37(e)(2), for them to get a significant  
8 sanction, which is what they are seeking, they would need to  
9 show bad faith intent. And their -- if you look at their  
10 briefs, in their reply brief what they do is they say, we  
11 haven't shown that we had a reasonable reason not to keep the  
12 information. That's their argument. That doesn't get even  
13 close to bad faith intent.

14 Now, under (e)(1), Your Honor, Your Honor does have  
15 great discretion. But here, A, Cox has had this for a very  
16 long time and waited to the last minute to bring this. And the  
17 notion that they waited because of the Slawomir deposition in  
18 Lithuania is not true. It's not accurate.

19 They could have -- A, they could have brought it two  
20 days after the Slawomir deposition. They didn't. They waited  
21 until the midst of summary judgment briefing.

22 They could have brought it after the Sam Bahun  
23 deposition. They could have brought it when they received the  
24 spreadsheets. They didn't ask any questions in discovery of  
25 any of the witnesses about any of this. They never came to the

1 Court and complained about any of it.

2 So now they come to you and they want sanctions.  
3 Your Honor, they have what they have. Those two other  
4 spreadsheets that they got on their own, that's their own mess.  
5 They can deal with that.

6 At the end of the day, they have the underlying  
7 files, and this is my last point and I will sit down, Your  
8 Honor. They say, well, we don't have all the files. That's  
9 not true. For every work in suit, they have the underlying  
10 file.

11 THE COURT: And what does that mean, they have the  
12 underlying file?

13 MR. OPPENHEIM: So when MarkMonitor did the initial  
14 -- did the download, right, they got the hash, there is a file.

15 THE COURT: Okay. And that --

16 MR. OPPENHEIM: That hash file, the file, a file with  
17 that hash with the works in suit has been produced to the  
18 defendants.

19 THE COURT: No matter when that hash -- that file was  
20 downloaded, it had been done --

21 MR. OPPENHEIM: A hash is the hash.

22 THE COURT: It could have been done in 2008, 2009,  
23 2010?

24 MR. OPPENHEIM: Right. It could have been done any  
25 time.

1           There is one, one thing to be clear here, Your Honor.  
2       There were a lot of infringement notices for works that the  
3       plaintiffs have not filed suit -- have not asserted claims on.

4           We -- we've -- we have only asserted claims on  
5       certain works that we know Cox's subscribers -- I'm going to  
6       get -- I didn't articulate that well. Let me try that again.

7           We've only asserted works when we've identified a Cox  
8       subscriber who is the subject of three or more notices. And  
9       even then, we haven't asserted claims on every work.

10          So while there may be 10,000 works in this case, the  
11       notices probably cover far more.

12          But as -- so to the extent that they say, well, it's  
13       only a portion, they have everything that is a work in suit,  
14       Your Honor.

15          So, Your Honor, just in closing, they haven't met any  
16       of the elements, yet alone all of them, by clear and convincing  
17       evidence, as is their obligation.

18          THE COURT: Okay.

19          MR. OPPENHEIM: I'm sorry, I'm --

20          THE COURT: Okay. Well, let -- you have got a  
21       footnote coming here it sounds like.

22          MR. GOULD: A big footnote.

23          MR. OPPENHEIM: My colleague really thinks I should  
24       show you the spreadsheet that has the 0s and negative 1s that  
25       Mr. Buchanan made such a point about. If Your Honor will allow



1 me, I'll hand it up.

2 THE COURT: All right, I'll take it. And then Mr.  
3 Buchanan can help me understand it if he needs to.

4 MR. OPPENHEIM: So Mr. Gould is correct that Mr.  
5 Buchanan spent a significant portion of his argument on this  
6 notion that there were certain columns in the MarkMonitor  
7 spreadsheet that said Null, 0, or negative 1.

8 And what you have in front of you, Your Honor, is an  
9 excerpt from the spreadsheet, but this is for all of the tens  
10 of thousands of entries on the spreadsheet, this is the  
11 totality of all of them that have Null --

12 THE COURT: This is just for the eDonkey, Gnutella,  
13 and Ares? It's not --

14 MR. OPPENHEIM: BitTorrent doesn't have any it, Your  
15 Honor.

16 THE COURT: Okay.

17 MR. OPPENHEIM: And BitTorrent -- and that's why the  
18 percentage numbers that get thrown around are so -- so high or  
19 low depending upon what they were aiming for. And that's  
20 because BitTorrent, which is the overwhelming peer-to-peer  
21 network at issue here, didn't have any of these Nulls, negative  
22 1s, or 0s.

23 THE COURT: Okay.

24 MR. OPPENHEIM: But you'll see here, Your Honor, on  
25 page 1, that the match duration is negative 1, Your Honor. It

1 doesn't make any sense, Your Honor.

2 Right. So, yes, so Cox said -- Mr. Buchanan said,  
3 this is 10 percent of the 2 percent. So this goes to that.

4 But -- but you'll see here, this match duration of  
5 negative 1, they're saying based on that there was no match.  
6 But all of the other witnesses, Your Honor, have said that if  
7 Audible Magic returned a -- returned an artist name, a track,  
8 and an album, that that was a positive identification.

9 And you'll see that that exists for all of these.  
10 You see artist, track, and album, right there on the  
11 spreadsheet, Your Honor.

12 THE COURT: Well, how -- how was this information,  
13 Null, negative 1, populated and then placed into the  
14 spreadsheet? I mean, what's the explanation for that?

15 MR. OPPENHEIM: So as I understand it, had they asked  
16 the MarkMonitor -- either of the two MarkMonitor witnesses --  
17 and I think they did touch on this just slightly with Slawomir.  
18 That in 2015 they started -- MarkMonitor started to try to  
19 retain additional information because they thought it might be  
20 useful in the future for some purpose. And they were trying to  
21 figure out how to translate information from the Audible Magic  
22 download into their servers.

23 And while you're experimenting on figuring out how to  
24 do that, sometimes it wouldn't work and you would get a Null,  
25 0, or negative 1. As you will see, Your Honor, it's a tiny

1 number of entries.

2 THE COURT: All right. Okay.

3 Okay, Mr. Buchanan.

4 MR. BUCHANAN: So I'll just start from the last  
5 point.

6 The reason there is no negative 1s or 0s for  
7 BitTorrent, and there is -- why there is only 2 percent of the  
8 data and 10 percent that shows 0 or 1 of the 2 percent, is  
9 because that's all they produced. There is no -- there is no  
10 declaration in this case from any witness for the plaintiffs to  
11 support those last comments by counsel.

12 There is no declaration that says that what we say  
13 those columns mean, that the negative 1 and the 0s mean there  
14 wasn't a match, there is no one that counters that.

15 THE COURT: Well, that's just your statement.

16 MR. BUCHANAN: No.

17 THE COURT: It's their statement.

18 MR. BUCHANAN: No, but --

19 THE COURT: I mean, you know, I don't have the  
20 testimony of anybody as to -- who really knows what that means  
21 before me. Right?

22 MR. BUCHANAN: Well, the -- the exhibit itself has  
23 all these, these columns. And we did produce Exhibit J to our  
24 initial brief, the Exhibit J to Ms. Diana Leiden, Diana Hughes  
25 Leiden's affidavit or declaration.

1 THE COURT: All right.

2 MR. BUCHANAN: The testimony of Paszkowski, and he  
3 talks about these various columns.

4 THE COURT: But how did -- I mean --

5 MR. BUCHANAN: And he says, after we went over each  
6 of those fields with him, he never said anything to the effect  
7 that we just started putting those in in 2015, they didn't have  
8 any relevance to anything.

9 He says: We just started collecting them in 2015,  
10 but we were getting them, that information from Audible Magic  
11 before that, we just didn't retain it, we basically destroyed  
12 it.

13 Now, they didn't retain it. And so, what he says  
14 here --

15 MR. OPPENHEIM: Could you read the testimony to the  
16 Court? You forget how they then --

17 THE COURT: Yeah, just tell me what page you're  
18 talking about. I've got Exhibit J in front of me.

19 MR. BUCHANAN: So I will get to that in -- let's see.  
20 He testifies -- let's see. I'll find it, Your Honor.

21 What he says is -- he says they did not keep that  
22 data until 2015. That's undisputed, no one disputes that. So  
23 that means they didn't retain it.

24 So whether you say destroyed or not, he doesn't use  
25 that word, but they didn't keep it. So it was technically

1 destroyed electronically.

2 I'm not saying that the guy sat down and said, I'm  
3 going to destroy all this evidence so it can't be used in  
4 litigation.

5 But after we go through AM track duration and match  
6 percentage and the verification type, and we go through all  
7 those columns -- he talks about how they kept them and what  
8 they mean. And then he says on page 99 of his deposition: So  
9 the spreadsheet we are looking at now contains data from the  
10 verification process. It's used to determine what  
11 infringements were captured in our collection process can be  
12 used for noticing and which ones can be used -- cannot be used  
13 for noticing. Basically, whether there is a match.

14 So he goes through those columns specifically. He is  
15 shown the '236 spreadsheet. He talks about the data.

16 Now, we have testimony also in a statement from  
17 their -- in their -- in our brief, our reply brief we quote  
18 from Barbara Frederiksen-Cross who says -- we asserted:  
19 Barbara Frederiksen-Cross has acknowledged that in response to  
20 a matching inquiry from MarkMonitor, quote, Audible Magic  
21 returned an XML formatted file that contained an indicator  
22 indicating whether the match was successful. And that's that  
23 AM ID verification column. And it -- basically that's where  
24 you get that alphanumeric number.

25 Now, with regard, Your Honor, I wanted to point out

1 that in terms of this -- right. Okay.

2 THE COURT: I mean, Frederiksen-Cross is your expert,  
3 she is the director of litigation services at JurisLogic. She  
4 isn't somebody at MarkMonitor or Audible Magic who actually  
5 knows what those columns were, and what they meant, and whether  
6 it was or wasn't a match if it presented the artist's name and  
7 number in the spreadsheet, right?

8 MR. BUCHANAN: No, he's their -- he's their technical  
9 expert --

10 THE COURT: No, you just mentioned --

11 MR. BUCHANAN: Hoskowski?

12 THE COURT: Frederiksen-Cross, right? Didn't you  
13 mention what she just said in her declaration.

14 MR. BUCHANAN: So yeah, initial -- the first  
15 testimony we read --

16 THE COURT: Yeah, the deposition testimony doesn't  
17 address any of this that you talked about. I mean, it doesn't  
18 talk about anything having to do with null values. I just read  
19 it, pages 99, 98 and 99.

20 MR. BUCHANAN: No, that addressed the point that  
21 counsel made that said that we didn't ask anyone about those  
22 four columns of information and what they meant. And he  
23 described and his testimony says --

24 THE COURT: Well, you asked what the spreadsheets  
25 meant.

1 MR. BUCHANAN: Right. But those four columns of  
2 information, if you look at 81, we go through all of that  
3 information, the match offset, the match duration, the AM item  
4 ID, and the match percentage, and the AM verification type.  
5 All five --

6 THE COURT: I see 81, but I don't see anything after  
7 81 until 97.

8 MR. BUCHANAN: That's right. But if you look at 81,  
9 he talks about those four columns. And he says, this is --  
10 it's whether it's MarkMonitor's data or whether it's Audible  
11 Magic's data.

12 THE COURT: All right.

13 MR. BUCHANAN: So, again, I mean -- I would like to,  
14 you know, go back to the spreadsheet itself.

15 THE COURT: Which one?

16 MR. BUCHANAN: The '236 spreadsheet.

17 THE COURT: All right.

18 MR. BUCHANAN: And I guess it was the last document  
19 passed up that said, look, it's only a tiny bit of data. Well,  
20 it's -- it's a sample that is indicative of what the whole  
21 spreadsheet would look like if we had all the data.

22 To sit here and say, they don't have any data for  
23 anything beyond 2 percent, they don't have anything on  
24 BitTorrent, which is the major protocol which the alleged music  
25 was downloaded, they don't have any of that. Of course we

1 don't because they didn't give it to us. That information was  
2 retained -- it was part of the MarkMonitor process. And they  
3 queried Audible Magic and it produced that information.

4 And to -- I would jump to the point about Audible  
5 Magic and our expert saying 75 percent didn't match. Their  
6 expert said the same thing. She said, qualified it, saying,  
7 well, the 30(b)(6) witness of Audible Magic said, right, he  
8 said that we produced substantially all of the data, but there  
9 was some period of time where we might not have everything, but  
10 substantially all.

11 So we have that. And we know that based on our  
12 expert, there wasn't a match for 75 percent. Their expert --

13 THE COURT: During that time period?

14 MR. BUCHANAN: Yes, for the time period in question.

15 THE COURT: During the -- that's right. And that's  
16 the part that I'm still confused about. And I don't know  
17 whether I'm missing it or not.

18 But you keep talking about the Audible Magic -- the  
19 information that was presented by Audible Magic for a limited  
20 period of time and the matches that those records show.

21 My understanding is that, you know, matches could  
22 have occurred prior to that limited period of time. And what  
23 is the significance -- and just let me finish so he understands  
24 the question before you talk to him. Okay?

25 MR. BRODY: All right.



1 THE COURT: I want to make sure that he can  
2 understand the question and you understand the question that I  
3 want the answer to.

4 So my understanding of the Audible Magic transaction  
5 log is that it is related to a period of time of, let's just  
6 say two years. That matches were done long before that  
7 two-year period. And the idea that that transaction log only  
8 covers a certain percentage of works doesn't mean there wasn't  
9 ever a match to a work prior to that.

10 MR. BUCHANAN: And the testimony of their expert,  
11 Barbara Frederiksen-Cross --

12 THE COURT: Well, make sure you --

13 MR. BUCHANAN: I've got it.

14 THE COURT: All right.

15 MR. BUCHANAN: I have an answer.

16 THE COURT: Okay.

17 MR. BUCHANAN: This time at least.

18 MALE VOICE: I should know better than to doubt him.

19 MR. BUCHANAN: So Barbara Frederiksen-Cross testified  
20 about this. And she said that only 25 percent of the matches  
21 related to the works in suit occurred before 2012. Did I get  
22 that right?

23 Okay. So it was 25 percent of downloads occurred  
24 before the 2012 period. So, obviously, you can't have a match  
25 without a download.

1           So when we used the 75 percent figure on what we  
2 have, that's correct. And plaintiffs' counsel made a point,  
3 oh, you can't count that because you have got to go back in  
4 time. He didn't tell you what we put in our briefs and what  
5 the testimony is, is that she carved out 25 percent only.

6           So we have 75 percent of the works in suit were  
7 downloaded and allegedly matched in that time period. And  
8 that's what that Audible Magic spreadsheet shows.

9           So it's not -- they poo poo all this evidence and  
10 they say we didn't ask all these questions. But we did ask the  
11 questions. They described the transaction log. They described  
12 how every time there was a query, they said the MarkMonitor  
13 '236 spreadsheet should be identical to theirs. It should have  
14 all that information if they want it. We retained it, they  
15 didn't.

16           Now, I would like to address this issue of the -- the  
17 Statement of Work. First of all, the Master Agreement they  
18 never talked about. They never talked about the testimony of  
19 the general counsels from the two, UMG and Sony, who testified  
20 when asked that they believed there was going to be litigation.  
21 They were asked about that. Why you were retaining  
22 MarkMonitor? Did you -- were they required to retain the  
23 evidence for litigation? Yes.

24           THE COURT: And the evidence that they were required  
25 to retain is specified particularly in T on pages 27 and 28.

1 MR. BUCHANAN: That's the Statement of Work. That's  
2 not the Master Agreement.

3 THE COURT: Well, the Statement of Work refers to, it  
4 says at the very beginning of it: This Statement of Work  
5 dated -- is made in reference to the Master Agreement  
6 so-and-so. The Statement of Work to describe the technical  
7 obligations regarding their agreement to scan and do so and so.

8 So, you know, this is a Statement of Work directly  
9 related to the February 15, 2012 Master Agreement that explains  
10 in detail what -- what are the data capture and storage  
11 requirements under the Master Agreement.

12 MR. BUCHANAN: That's correct. And I would make two  
13 points. First of all, this was never put forward in their  
14 briefs or by any declaration, that particular passage.  
15 However --

16 THE COURT: Well --

17 MR. BUCHANAN: -- if you go the page before that,  
18 under hash-based verification, if you recall, plaintiffs'  
19 counsel said, now there is a hash that is created right away,  
20 it is key, you download the music, it's unique, the file has a  
21 hash. And this talks about hash-based verification. And it  
22 says: And describe in the section below captioned Data Capture  
23 and Storage all evidence will be saved, including without  
24 limitation, packets of data that are received and exchanged  
25 during the process.

1           So this is talking about hash space verification,  
2       which is we're talking about, the match.

3           THE COURT:   Well --

4           MR. BUCHANAN:   The other has to be with the  
5       notification.

6           THE COURT:   All right.   So before I forget, let me  
7       ask this question.   They have indicated that you have all of  
8       the files relating to the hash values.   Is that right or not?

9           MR. BUCHANAN:   So what they are referring to is PX  
10      39, which is 57,000 audio files.

11          THE COURT:   Right.

12          MR. BUCHANAN:   Which Mr. Bahun talks and references.  
13      Which no expert listened to.   Which no witness ever listened  
14      to.   For which there is no evidence of when they were  
15      downloaded, when they were matched.   It's just a file.

16          In addition --

17          THE COURT:   It's a file with a hash value.   So if --

18          MR. BUCHANAN:   But it hasn't --

19          THE COURT:   If you thought this hash value -- if, you  
20      know, you have some concerns about the veracity of this hash  
21      value being directly related to or consistent with a work, an  
22      original work part of this lawsuit -- I mean, you have that raw  
23      data.   You keep saying, I don't want -- now you're saying, I  
24      don't want raw data.   Sometimes you say you want raw data.

25          MR. BUCHANAN:   But this -- wait, this raw data is

1 57,000 music files. They're saying for us to listen to the  
2 songs. And what do we match it to? How do we know what's on  
3 those files, it matches with anything?

4 THE COURT: Well, all the notices --

5 MR. BUCHANAN: We don't have access --

6 THE COURT: -- indicate the hash value, right? I  
7 mean, all of these notices that were sent out said a specific  
8 hash value that they said was being infringed, right?

9 MR. BUCHANAN: Right.

10 THE COURT: And so, you could -- you have been given  
11 the raw data to correlate, you know, what they say that hash  
12 value was with a -- you know, what they say that hash value is,  
13 and you could verify whether that was in fact a work that is  
14 owned by the plaintiffs and being infringed.

15 MR. BUCHANAN: There is only -- there is -- two  
16 points. None of their experts or any witness have listened to  
17 those files and said they are what they are or when they were  
18 created.

19 Second, the one expert, George McCabe, said he asked  
20 the plaintiffs to give him a list, an index of everything that  
21 is on there.

22 THE COURT: Who is George McCabe?

23 MR. BUCHANAN: He is an expert witness for the  
24 plaintiffs.

25 THE COURT: Okay. He asked --

1 MR. BUCHANAN: So right before he filed his report,  
2 they gave him, I think it's spreadsheet 432. So we analyzed  
3 432 to see if just looking at what was on there matched with  
4 what PX 39, the audio files. 22 percent of the files listed on  
5 the index relied by their expert were not on the audio files.  
6 And there is no way we could listen to those audio files unless  
7 we have access to the Audible Magic library. How could we  
8 match?

9 We can't do -- just because it has -- has a hash,  
10 doesn't mean what's on there actually ever matched. That goes  
11 back to the '236 spreadsheet.

12 THE COURT: All right.

13 MR. BUCHANAN: If you recall, those -- the  
14 negative -- what does negative 1 and 0 mean? Does anyone doubt  
15 that means that that's not a match? I mean, they --

16 THE COURT: Yeah, I mean, they just said it doesn't  
17 mean -- it's garbage, is what they're saying.

18 MR. BUCHANAN: Okay. Where is the --

19 THE COURT: Maybe it is, maybe it isn't. You know,  
20 but I don't know.

21 MR. BUCHANAN: Where is the -- where is the  
22 declaration from MarkMonitor or Audible Magic that says that?

23 THE COURT: Well, where is the declaration that says  
24 that means it isn't a match? I mean, you know --

25 MR. BUCHANAN: Well, if -- if the testimony of

1 Paszkowski -- if I got his name right -- he describes what  
2 happens. If you're taking two songs that are five minutes and  
3 you're running them for 20 seconds, and the match duration,  
4 which is the amount of time, it's described in his deposition,  
5 that there is a match, and the match offset shows at what point  
6 in time, and you look at the Audible Magic, that does -- it has  
7 44 seconds, it has 44 in there. It is measured in seconds.

8 That column, the testimony of Paszkowski is it's  
9 measured in seconds. The track duration is measured in  
10 seconds. The match duration is measured in seconds. And  
11 MarkMonitor added their own column, which they described in the  
12 testimony, that matches the duration versus the track.

13 THE COURT: Mr. Buchanan, you're looking at something  
14 that says the track duration. That is that the work that I am  
15 examining is minus one second or minute long. Doesn't that --  
16 just a red flag that something doesn't make sense here? That  
17 it's less than 0 time?

18 To give you the impression that, you know, this  
19 information really isn't valid information? So, I mean, the  
20 idea --

21 MR. BUCHANAN: How --

22 THE COURT: -- that you're now going to make the  
23 argument that, you know, the Bruno Mars Marry You track is, you  
24 know, somehow or another in space and time, you know, less than  
25 a 0 length in -- you know, this AM track duration column, do

1 you see that? Where all the other ones that have AM track  
2 duration of like, 536, 450, 404, 352, this column shows AM  
3 track duration of minus 1.

4 And I think every -- well, maybe one as 0, a couple  
5 have 0, but they are all minus 1 or 0. So there is nothing  
6 there. Or there is less than nothing.

7 Doesn't that -- just a red flag that that doesn't  
8 make sense?

9 MR. BUCHANAN: Well, that --

10 THE COURT: That entry.

11 MR. BUCHANAN: In the columns where there is over  
12 90 percent match, are those meaningless as well? I mean --

13 THE COURT: Well, those are not in the -- never mind.  
14 Go ahead.

15 MR. BUCHANAN: So, Your Honor, if you are correct,  
16 wouldn't we have a declaration from Audible Magic to say that  
17 that negative 1 does not mean that there was a match or not?

18 There is no testimony from their -- I mean, on its  
19 face I think -- you know, first of all, on its face it says  
20 negative 1, and I believe that says no match. All they had to  
21 do was come in with Mr. Ikezoye or someone from MarkMonitor and  
22 say, we reviewed that. And they just give an explanation, but  
23 there is no declaration.

24 I mean, I believe, and the case law supports this,  
25 that once, you know, we -- the burden shifts --



1 THE COURT: What --

2 MR. BUCHANAN: Once the moving party shows that the  
3 spoliated material is likely to be relevant in the action, the  
4 burden to show otherwise falls on the party charged with  
5 spoliation. That's from duPont versus Colon, Judge Payne's  
6 opinion in which he goes through all the cases on spoliation.

7 THE COURT: Back in early 1990.

8 MR. BUCHANAN: Yeah, it is -- but it hasn't been  
9 reversed. I mean, I think -- I think there is nothing in the  
10 notes that say the burden changed.

11 But the point is that on its face -- so we can sit  
12 here, now we're debating in a vacuum. Why don't we just have  
13 all the information and all the data? And they can laugh at it  
14 and say it doesn't mean anything, it's hogwash --

15 THE COURT: Or you can say there are too many files,  
16 I am not going to look at it.

17 MR. BUCHANAN: Wait, that's --

18 THE COURT: Which would give you the hash value  
19 information. I mean --

20 MR. BUCHANAN: They didn't look at the files.

21 THE COURT: Well --

22 MR. BUCHANAN: Those aren't admissible. There is no  
23 authentication of those. There is no foundation for any of  
24 that.

25 When you say, look at them, they are music files. We

1 would have to listen to them and match them. I couldn't just  
2 start listening to 57,000 files and say, okay, that sounds like  
3 Bruce Springsteen. I need to -- how do I identify that and  
4 match it up to a notice? The burden is on them on direct  
5 infringement.

6 THE COURT: Right.

7 MR. BUCHANAN: It's not on us.

8 THE COURT: I understand the burden is going to be on  
9 them when the trial of this case gets going.

10 MR. BUCHANAN: So the idea, they say, we gave them a  
11 bunch of files, 57,000, they are going to play them for the  
12 jury.

13 Do you know how many of those files their expert  
14 listened to? Two. And how she did it? She listened to them  
15 and then got on iTunes and matched them up.

16 So that's what we're supposed to do? 57,000 files,  
17 put on iTunes and match them up? I mean, the burden was on  
18 them to have someone listen to at least a substantial  
19 percentage.

20 And as we put forward an affidavit that says, the  
21 index they gave us, which is shorthand, which their expert  
22 relied on, 22 percent of the audio files listed on the index  
23 that is supposed to match directly with the audio files, does  
24 not match. They have never filed an affidavit or countered  
25 that evidence. And we submitted an affidavit that did that

1 analysis.

2           So all I'm saying, Your Honor, is we can debate, you  
3 know, this evidence, but the idea that they could say, well, we  
4 decided to start collecting it in 2015, we didn't keep it  
5 before then, Audible Magic collected it, it's not relevant, you  
6 didn't ask them the right questions, I just -- I think that in  
7 this case, that it would have been very easy for them to retain  
8 that.

9           And as I just read from the Statement of Work, I  
10 mean, it talks about keeping evidence files, case files.  
11 That's what their experts relied on, these case files, evidence  
12 files to prove their case, which includes this, the '431  
13 spreadsheet. The '236, they didn't rely on, and neither did  
14 they rely on the Audible Magic spreadsheet.

15           So that's our position, Your Honor.

16           THE COURT: All right. Thank you.

17           I don't need to hear any more.

18           You know, I have read these materials. I've heard  
19 fairly lengthy argument from counsel. And, you know, it's an  
20 interesting issue. It's one that has, obviously, some real  
21 significance in the matter.

22           And I think given the relief that is requested, that  
23 is striking an exhibit that is as central to the expert's  
24 testimony as both sides seem to agree that it is, that this  
25 would fall into the 37(e)(2) category as opposed to the

1 37(e)(1) category, the request to strike the exhibit, because  
2 it could in fact result in the damages case being excluded  
3 because they wouldn't have the testimony of that.

4 So I have to look at that, I think, through those --  
5 through that pair of glasses.

6 Initially, you know, I'm -- you have to have a duty  
7 to preserve the information in anticipation of the conduct of  
8 the litigation. You know, I do not find at this point in time  
9 that in the 2013/2014 time frame, that there was necessarily an  
10 anticipation of this litigation or this type of litigation that  
11 would require one to keep every piece of information relating  
12 to every examination, work, verification, or whatever of the  
13 various notices that were sent out during that time period.

14 The argument having to do with the Master Agreement  
15 and the Statement of Work, you know, provides certain  
16 information that was to be retained. My understanding, based  
17 on what has been presented here today from the plaintiff -- the  
18 plaintiffs, is that the information outlined in the Statement  
19 of Work, which is Exhibit T on pages 27 and 28, which specify  
20 what was to be data captured and stored for the relevant  
21 information contained in that, that it was captured, stored,  
22 and produced to the defendant in response to the discovery  
23 requests for the time period relating to there.

24 So as an initial matter, I find at this point in time  
25 that there really wasn't a duty to preserve any more of the

1 information than what was outlined in the Statement of Work,  
2 and that has been produced.

3 I think, you know, the reasonableness of the party in  
4 this, state they had an agreement, they expected MarkMonitor to  
5 agree by it. They did do it, it seems reasonable. So I think  
6 it has been reasonable.

7 I also find that there is no -- if we get to the  
8 point of where we have to deal with whether it's (e)(2), with  
9 the intent to deprive another party of information in the use  
10 in the litigation, there is no evidence that, you know, this  
11 was specifically not retained for the intent to deprive Cox for  
12 the use of that information in this litigation.

13 You know, I understand the arguments, and I  
14 appreciate the arguments that this spreadsheet, you know, may  
15 be subject to some attack, either whether it gets excluded or  
16 whether it gets -- the weight of it gets reduced at the trial  
17 of the case when the experts and various people come in and  
18 provide testimony as to what this column means, what this  
19 column doesn't mean, or who did this, and what this information  
20 is, you know, that's -- that will be information that the jury  
21 can assess and make a determination as to what weight it should  
22 give to that particular spreadsheet.

23 But at this point in time, I don't think sanctions  
24 are appropriate.

25 So I am going to deny the motion to exclude the

1 exhibit based on a violation of a failure to comply with a  
2 discovery obligation to preserve discoverable information.

3 Thank you very much. I appreciate it. You all have  
4 a good weekend.

5 Court will be adjourned.

6 MR. OPPENHEIM: Thank you, Your Honor.

7 MR. BUCHANAN: Thank you, Your Honor.

8 NOTE: The hearing concluded at 3:53 p.m.

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